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Quality Paving Co., Inc. v. Thomas A. Musselman

Appellee's Brief 1976-SC-0448

APPELLEE'S BRIEF

559 SW 2d 486

SUPREME COURT OF KENTUCKY

No. 76-448

QUALITY PAVING CO., INC. - - - Appellant

versus

THOMAS A. MUSSELMAN - - - - Appellee

APPEAL FROM JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, FIFTH DIVISION
JUDGE RAYMOND C. STEPHENSON

BRIEF FOR APPELLEE

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This is to certify that copies of the within brief have been served on D. H. Robinson, and the Hon. Raymond C. Stephenson, the trial judge, pursuant to RAP 1.250.

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3. Is the Judgment entered supported by substantial evidence?

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BRIEF FOR APPELLEE

May it please the Court:

COUNTERSTATEMENT OF THE CASE

A. Nature of Proceedings

This action was brought by the Appellant, Quality Paving Company, Inc., hereinafter called "Quality" against Thomas A. Musselman, the Appellee, hereinafter called "Musselman" in respect to a contract between the parties whereby Quality was to perform certain work for Musselman in the construction and paving of a parking lot in Louisville. Musselman had paid $17,500 on the contract and the balance of $8,194.70 was the sum sued for by Quality (T.R., p. 2).

Musselman filed and Answer and Counterclaim which admitted the contract and the payment of $17,500 and denied that any sum was owed to Quality by Musselman. Musselman then filed a Third Party Complaint against Western Pancake House of Kentucky, Inc., No. 3, hereinafter called "Western" on a separate and distinct contract between them. Western filed its Answer to the Third Party Complaint of Musselman and admitted the agreement, and denied the remaining allegations and stated that no amount was due Musselman until construction was completed in a workmanlike manner with regard to the parking lot in question (T.R., pp. 18 and 19). Western is not a party to this appeal.

This matter came on for trial before the Court without a jury on January 12, 1976, and testimony was heard by witnesses in person and also by deposition and without a court reporter. Following the trial, Findings of Fact and Conclusions of Law were filed by Quality on January 26, 1976, and were rejected by the Court on January 28, 1976 (T.R., pp. 25 to 30).

On January 26, 1976, Western filed Proposed Findings of Fact and Conclusions of Law which were adopted by the Court on January 28, 1976 (T.R., pp. 31 to 33). Findings of Fact and Conclusions of Law were submitted by Musselman on January 26, 1976 (T.R., pp. 34 to 39) and were adopted by the Court on March 1, 1976, at which time the Court entered Judgment dismissing the Quality claims against Musselman. This is the Judgment from which Quality appeals.

B. The Facts

Quality and Musselman entered into a written contract on April 10, 1974, whereby Quality agreed to pave certain parking areas of the Thrifty Dutchman Motel and Pancake House on Fern Valley Road in Louisville, Kentucky. There appears to be little doubt based on the facts of this case that at the time that Quality's work was completed in June of 1974 the parking lot located at the Pancake House was not draining properly. This caused both small and large puddles to be formed and created numerous problems in the area.

The contract between Quality and Musselman, which contract was prepared by Quality, states as follows:

> "All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices" (T.R., p. 14).

The facts of this case show that at no time immediately after Quality completed its work on this project did the parking lot properly drain. From the first rain after Quality's completion of its work there was puddling of a serious nature. It was obvious from the condition of the parking lot that Quality did not comply with the contract and that its work was not done in a workmanlike manner.

Quality contends that it rented a grader and a grader operator to Musselman but had no control over his actions. Musselman contends that he rented the grader and the grader operator and was depending

upon the expertise of Quality and Quality's employees to work with Musselman to properly grade the parking lot before the paving could be formed. It was Musselman's understanding from the contract and from prior dealings with Quality that he was buying Quality's knowledge, expertise and services for the grading and paving of a parking lot.

Quality further contends that its sole responsibility under the contract was to pave the parking lot. Quality states it had no responsibility with regard to grading or the shooting of any final grades but was simply to back its truck up to the job site, drop and spread its paving materials and leave. This, of course, is absurd.

Musselman paid $17,500 to Quality but withheld the balance because he contended that Quality's work was not done in a workmanlike manner and was totally unsatisfactory. Because of the unsatisfactory work performed by Quality, Western refused to pay Musselman the balance it owed to Musselman.

ARGUMENT

A. The Court Did Enter Findings of Fact and Conclusions of Law in That It Adopted Musselman's Findings of Fact and Conclusions of Law.

This action was tried before the Court without a jury and *Kentucky Rules of Civil Procedure 52.01* provides that the Court "shall find the facts specifically and state separately its Conclusions of Law thereon and render an appropriate Judgment." Fol-

lowing the trial Quality tendered Findings of Fact and Conclusions of Law to the Court and there were rejected. Musselman also tendered Findings of Fact and Conclusions of Law to the Court as did Western and both Western's and Musselman's Findings of Fact and Conclusions of Law were adopted by the Court.

The law is clear that the Trial Court may invite counsel to submit proposed Findings as it did in this case. If requested Findings are adopted by the Court then they become the Findings of the Court. In *Taylor Instrument Company* v. *Fee and Stemwedel, Inc.*, 129 Fed. 2d 156 the Court said:

> "Each party, if he so desires, can present Findings setting forth his theories and the evidence which he thinks supports such theories and it is then Court's duty to select the Findings which it thinks correct and reject those which it thinks are wrong and the Court can restate the Findings in other language or can adopt the Findings as submitted and if the Court adopts them they become the Court's Findings regardless of who wrote them and after that the only issue is the correctness."

The Court advised Musselman that it was accepting his Findings of Fact and Conclusions of Law and to prepare a Judgmnt accordingly which Musselman did and said Judgment was signed by the Court on March 1, 1976 (T.R., p. 44). The original authorship of Findings of Fact and Conclusions of Law is not important and once requested Findings are adopted by the Court they become the Findings of the Court.

This is exactly what happened in this case. There was no defect in the procedure followed by the Court and the Court's Judgment should be sustained.

B. Any Error Made by the Trial Court in Receiving Testimony Must Be Objected to at the Time the Testimony Is Received and Must Be Properly Preserved.

During the course of the trial Musselman testified that he and Cato, President of Quality, had met and that Cato had offered to reduce his claim by $3,000 and to accept approximately $5,000 in settlement of his claim (T.R., p. 57). There is nothing in the record which would indicate that Quality objected to the testimony of Musselman. *Kentucky Rules of Civil Procedure 46* provides:

> "Formal objections to ruling or orders of the Court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the Court the action which he desires the Court to take or his objection to the action of the Court, and on request of the Court his grounds therefor."

The law is very clear that failure to object to improper testimony at the trial prevents objection on appeal. In *Division of Parks Department of Corrections* v. *Hines,* Ky., 316 S. W. 2d 60 the Court said:

> "Where defendant did not object upon trial to admission of evidence he could not question its admissibility on appeal."

In *Freepartner* v. *Rutledge,* Ky., 405 S. W. 2d 290 the Court said:

> "Failure of party to object to exclusion of testimony at trial was fatal to challenge on appeal."

Under comment 3 of Clay Kentucky Rules of Civil Procedure 46 in discussing how Court errors are preserved for review it states:

> "The Rule provides that for all purposes for which an exception has heretofore been necessary, the party has sufficiently protected himself for purposes of review on appeal or otherwise by taking either of two steps. Such party must, at the time a ruling is made or sought, either (1) make known to the Court the action he desires the Court to take or (2) object to the action of the Court. In addition, if the Court so requests he is required to specify the ground of his request or objection. The basic purpose of the Rule is to insure that (a) the trial court is apprised of the party's position so that it may void or rectify error and (b) the adverse party is afforded a like opportunity. The secondary purpose is to have the record show that the party adversely affected consider the order or ruling sufficiently significant to constitute reversible error in the event of appellate review."

It is obvious that in this case any Court errors that might have occurred were not properly preserved for review. It was incumbent upon Quality to make certain that any errors, if any there were, were properly noted for review purposes, however, the record does not show any such documentation whatsoever.

Quality's failure to comply with *Kentucky Rules of Civil Procedure 46* at the time of the trial precludes Quality from attacking any potential errors on appeal.

C. The Judgment Entered by the Court Was Supported by Substantial Evidence.

During the course of the trial Mr. James Ohligschlager, whose experience in the paving business spans almost twenty years and who was the only expert witness that testified beside the parties, stated that it was the standard procedure in the paving business for a paver to shoot final grades before laying its paving material in order to determine if the paving would do the job it was intended to do (T.R., p. 55, and Ohligschlager's deposition, questions 64 to 67). Quality's testimony was that is did not shoot any grades on this particular job before it began paving. Quality's president, Mr. Cato, testified that if Quality would have shot grades before paving the problems that ultimately occurred could have been very easily cured before paving. Quality further admits that if it had shot grades the problems that occurred in this instance could have been avoided and Quality further admits it did not shoot grades on this particular job. Mr. Ohligschlager testified that it was normal procedure in the trade for a paver to shoot final grades before paving, thus the conclusion is obvious that the faulty parking lot herein was the result of Quality's action or inaction. The contract herein called for Quality's work to be completed in a workmanlike manner according to standard practices and Quality failed to follow the standard

practices of its trade in performing the work required in this case.

The testimony of both Quality and Musselman shows that these parties had entered into a paving contract exactly like the contract in effect in this case for a similar job in Clarksville, Indiana, for which Quality performed the same work as it was to perform in this case and Quality was paid in full for that job by Musselman (T.R., pp. 50, 51 and 56). Quality's supervisor, Jerry Schneider, and Musselman both testified that Quality did in fact shoot final grades on the Clarksville, Indiana job before any paving was done (T.R., p. 53). The question thus becomes why did Quality shoot final grades before paving on one job and not shoot final grades on another job when the contracts for each job were the same. Quality shot final grades at the Clarksville job but not at the job that is involved in this case, even though the contracts were the same. Quality admits that if final grades had been shot at the job in dispute herein the problems that occurred would have been avoided. Since Quality did not shoot final grades at the job in dispute even though it should have under the standard procedure of the trade and even though Quality had shot grades on a paving job for Musselman under the same type contract, then Quality must bear the responsibility for whatever occurred.

Certainly Musselman's understanding that Quality would shoot final grades or take the necessary steps to assure that the paving would do the job intended was a reasonable position for him to take in light of his

prior dealings with Quality and his reliance on Quality's contract to follow standard practices within the trade.

Kentucky Rules of Civil Procedure 52.01 provides that:

> "Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to charge the credibility of the witness."

Clearly there was substantial evidence in this case to justify the Court's Judgment. In *Skelley Oil Company* v. *Holloway,* 171 Fed. 2d 670 the Court said:

> "On review, the question is not what Findings trial court might have reached on the evidence before it, but whether there was substantial evidence on which the Findings which the Court made could properly be based."

In *Tornello* v. *Deligiannis Brothers,* 180 Fed. 2d 553 the Court said:

> "A Judgment may be reversed only if the Findings of Fact are clearly erroneous and a Finding is not clearly erroneous if there is substantial evidence to support it."

Also in *Adkins, et al.* v. *Meade,* 246 S. W. 2d 980 the Court said:

> "Where Facts are submitted to trial court without intervention of jury its Findings thereon are entitled to the same weight as verdict of instructed jury and reviewing court will not disturb them unless they are flagrantly against the evidence."

This same case went on to say:

> "Where facts are submitted to Court without intervention of jury credibility of witnesses was matter for trial court."

The Judgment entered by the Court was obviously supported by substantial evidence in this case.

CONCLUSION

The Judgment entered herein on March 1, 1976, which adjudged that Quality should recover nothing of Musselman should be affirmed.

The Court did enter Findings of Fact and Conclusions of Law in that it adopted Musselman's Findings of Fact and Conclusions of Law.

Any improper testimony was not properly objected to and not properly preserved.

The Court in this case had the opportunity to see and hear the parties and the witnesses testify and based on what it saw and heard ruled against Quality and that ruling should be sustained.

Quality has shown no error committed by the lower Court. It is therefore respectfully submitted to this Court that it reaffirm the ruling of the lower Court in dismissing Quality's complaint.

Respectfully submitted,

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